Office - Supreme Court, U.S.
FILED
OCT 27 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-493

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT C. BICHAN, *Petitioner*,

v.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation, *Respondents*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

HENRY P. SAILER*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel of record.
Dated: 27 October 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

JOHN J. MCHUGH
CHADWELL, KAYSER, RUGGLES
MCGEE & HASTINGS, LTD.
233 South Wacker Drive
8500 Sears Tower
Chicago, Illinois 60606
(312) 876-2120
Attorneys for Air Products
and Chemicals, Inc.

WILLIAM G. SCHOPF, JR.
REUBEN & PROCTOR
Suite 2001
11 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5545
Attorneys for Liquid
Air Corporation

JOHN F. MCCLURE*
ARNSTEIN, GLUCK, WEITZENFELD
& MINOW
Sears Tower - 75th Floor
Chicago, Illinois 60606
(312) 876-7100
Attorneys for Chemetron
Corporation and Allegheny
International, Inc.

JOHN E. BURKE*
ROBERT C. NEWMAN
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza
Chicago, Illinois 60611
(312) 467-9300
Attorneys for Airco, Inc.

MILES KIRKPATRICK*
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 876-5000

H. BLAIR WHITE*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Union
Carbide Corporation

Attorneys for Respondents

QUESTION PRESENTED

Whether a former salaried corporate employee may maintain an action for treble damages under Section 4 of the Clayton Act by claiming that he was discharged and blacklisted by reason of his refusal to take actions in furtherance of an alleged price-fixing and customer-allocation conspiracy among his corporate employer and certain of its competitors.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES CITED	iii
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

CASES: Page

Blue Shield of Virginia v. *McCready*, 457 U.S. ____, 102 S.C. 2540 (1982) 6

Bravman v. *Basset Furniture Industries, Inc.*, 552 F.2d 90 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977) 5

Fields Productions, Inc. v. *United Artists Corp.*, 432 F.2d 1010 (1970), *cert. denied*, 401 U.S. 949 (1971) 3

Mulvey v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971) . 3

Ostrofe v. *H.S. Crocker Co., Inc.*, 670 F.2d 1378 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3075 (U.S., Aug. 2, 1982) (No. 82-174) 2-3, 4, 5, 6

Radovich v. *National Football League*, 352 U.S. 445 (1957) 4

STATUTES:

Title 15 U.S.C. § 15 (Clayton Act) i

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-493

ROBERT C. BICHAN,

Petitioner,

v.

CHEMETRON CORPORATION, a corporation; ALLEGHENY LUDLUM INDUSTRIES, INC., a corporation; AIRCO INDUSTRIAL GAS, a division of AIRCO, INC., a corporation; AIR PRODUCTS & CHEMICALS, INC., a corporation; LIQUID AIR CORPORATION OF NORTH AMERICA, a corporation; LIQUID AIR, INC., a corporation; and LINDE DIVISION, a division of UNION CARBIDE CORPORATION, a corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

Respondents urge that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered 25 June 1982 be denied for the reasons set forth below.[1]

[1] In compliance with this Court's Rule 28.1, corporate respondents submit the following information concerning their parents, subsidiaries (except wholly owned) or affiliates that are publicly owned (in whole or part) corporations:

ARGUMENT

ALTHOUGH THE NINTH AND SEVENTH CIRCUITS HAVE DISAGREED AS TO THE ANTITRUST STANDING OF SIMILARLY SITUATED PLAINTIFFS, THAT DIVERGENT RESULT IS LIMITED IN SCOPE AND POTENTIAL IMPACT AND DOES NOT REQUIRE RESOLUTION BY THIS COURT

The only ground seriously advanced by petitioner as to why certiorari should be granted in this case is that the holding below is in "direct and irreconcilable conflict," Petitioner's Brief at 4, with the opinion of the United States Court of Appeals for the Ninth Circuit in *Ostrofe* v.

Air Products & Chemicals, Inc., has no parent and owns an interest in Sociedad Espanola de Carburos Metalicos SA, a Spanish Corporation.

Airco, Inc., is owned directly by The BOC Group plc, a British company, and owns no partial interest in any public corporation.

Liquid Air Corporation (formerly Liquid Air Corporation of North America) is indirectly owned in part by L'Air Liquide, a French corporation, and Allegheny International, Inc., and owns an interest in Oxitenio do Brasil S.A. Liquid Air, Inc., has been renamed LAI Properties and is entirely owned by Liquid Air Corporation.

Chemetron Corporation is entirely owned by Allegheny Ludlum Industires, Inc. One or the other of these corporations owns an interest in Kaimona, Inc.; Trans Global Films, Inc.; Sciaky Bros. Inc.; Liquid Air Corporation; Midwest Carbide Corporation; Orgotherm, Inc.; New Bra-Con Industries, Inc.; Rob-Con Ltd.; Titanium Metals Corporation of America; Scripto, Inc.; Anja Engineering Corporation; Aljac Corporation; Longlite Pen Co.; Broadway Pen Corporation; Burnham Products Corp.; M.A. Ferst Ltd.; and Scripto Export, Inc.

Union Carbide Corporation has no parent and owns an interest in Union Carbide Mexicana S.A. de CV; F.A. White Martins; Union Carbide Canada, Ltd.; Union Carbide India, Ltd.; and Union Carbide Australia and New Zealand, Ltd.

H.S. Crocker Co., Inc., 670 F.2d 1378 (9th Cir.), *petition for cert. filed*, 51 U.S.L.W. 3075 (U.S., Aug. 2, 1982)(No. 82-174). While the Seventh and Ninth Circuits have reached different results on similar facts, the divergence of opinion involves only the standing of a very narrow class of antitrust plaintiffs and cannot be generalized in terms of "the expansive 'enforcement directed' theory of the Ninth Circuit versus the restrictive consumer theory of the Seventh Circuit." Petitioner's Brief at 6.

Confronted with a square conflict between two Courts of Appeals over the antitrust standing of an equally restricted group of possible claimants, this Court has previously declined to grant certiorari. In *Mulvey* v. *Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), the Court of Appeals held that a film producer had antitrust standing to challenge a distributor's block booking and expressly disagreed, 433 F.2d at 1076 n.4, with the contrary conclusion reached earlier that same year by the Second Circuit, *per curiam*, in *Fields Productions, Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (1970), *cert. denied*, 401 U.S. 949 (1971). It is noteworthy that this Court has never subsequently found it necessary to resolve that conflict, and the same considerations which led to the denial of certiorari in both *Mulvey* and *Fields Productions, Inc.*, are equally applicable here.

Recognizing that the mere fact of a conflict among circuits is not, under Supreme Court Rule 17.1, a controlling factor in the grant of certiorari, petitioner attempts to add color and substance to the divergence of result by characterizing it as follows:

> "This type of conflict is not likely to be resolved by further Circuit Court analysis in future cases. The

> battle lines have been sharply drawn, and resolution of this conflict at this early stage is needed to give direction in a great number of anticipated cases." Petitioner's Brief at 6.

These comments do not withstand analysis.

Any newly arisen conflict over the narrow issue of antitrust standing for a discharged employee is one which may well be resolved by future litigation. Prior to the Ninth Circuit's decision in *Ostrofe*, no case had ever granted antitrust standing to a discharged employee in the circumstances of petitioner here.[2] And as is apparent from the face of the majority opinion and emphasized in Judge Kennedy's vigorous dissent, *Ostrofe* does not build logically on any previous line of cases and in fact constitutes a sharp departure from established Ninth Circuit precedent. Lacking roots and subjected to cogent criticism at its inception, *Ostrofe* may well come to be recognized as aberrational by a Ninth Circuit more willing to join the mainstream of developing antitrust standing law.

The Ninth Circuit may be especially reluctant to perpetuate *Ostrofe* should other circuits join the Seventh in denying antitrust standing to similarly situated discharged employees. A step toward this self-corrective process may already be underway in the Third Circuit where, as noted by petitioner, one district court has relied upon and another has rejected *Ostrofe* as authority for granting antitrust standing to a discharged employee.

---

[2] Petitioner's contention that the decision below "conflicts factually and philosophically" with this Court's opinion in Radovich v. National Football League, 352 U.S. 445, 454 (1957), Petitioner's Brief at 7, is incorrect because *Radovich* involved, as this case does not, a conspiracy with the central purpose of preventing the free interchange of employees.

Petitioner's Brief at 6. A decision on the standing issue by the Third Circuit would be especially persuasive given that Court's espousal of a balancing test for standing "comprised of many constant and variable factors" which requires analysis of the "factual matrix presented by each case." *Bravman* v. *Basset Furniture Industries, Inc.*, 552 F.2d 90, 99 (3d Cir.), *cert. denied*, 434 U.S. 823 (1977). To the extent that *Ostrofe* is similarly premised on "a balancing of competing policy interests," 670 F.2d at 1383, a contrary result out of the Third Circuit may well incline the Ninth Circuit to reconsider in a future case involving the antitrust standing of a discharged employee the weight to be afforded various policy objectives. Should, on the other hand, the Third Circuit agree with the Ninth, that fact might suggest an irreconcilable conflict between the balancing and target area approaches to standing which would merit resolution by this Court. But as things now stand, the battle lines over the issue of antitrust standing for the terminated employee are not sharply drawn except as between two of twelve circuits. Any decision by this Court concerning the propriety of review should properly await further litigation that, even if not leading to total harmony, might produce a satisfactory majority view among the lower courts.

Petitioner's *in terrorem* argument about the need for present review by this Court to "give direction in a great number of anticipated cases," Petitioner's Brief at 6, is flatly controverted by *Ostrofe* itself. There the Court granted standing in part because it believed that:

> "Employees discharged by their employer for declining to take part in an antitrust violation are not so numerous that recognizing their claims would threaten a flood of litigation . . . ." 670 F.2d at 1385 (footnote omitted).

Petitioner's further suggestion that the Seventh Circuit's disposition of this case is "at odds" with *Blue Shield of Virginia* v. *McCready*, 457 U.S. ____, 102 S.C. 2540 (1982), Petitioner's Brief at 8-9, if meritorious, would not support but rather would cut against the grant of certiorari in this case. If, as petitioner asserts, this Court's recent determination affirming the antitrust standing of a consumer somehow bears strongly on the standing of a discharged employee, then the inferior courts should be expected to recognize that fact in deciding future cases, thereby eliminating any conflict and obviating the need for review here.

Finally, should this Court deny the pending petition for certiorari in the anterior *Ostrofe* case, it would follow that the petition here should also be denied. And conversely, should this Court grant the *Ostrofe* petition it would not be necessary to accept review of this case to resolve the conflict to which petitioner points.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the petition for certiorari should be denied.

DATED: 27 October 1982

Respectfully submitted,

HENRY P. SAILER*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel of record.

JOHN J. MCHUGH
CHADWELL, KAYSER, RUGGLES,
MCGEE & HASTINGS, LTD.
233 South Wacker Drive
8500 Sears Tower
Chicago, Illinois 60606
(312) 876-2120
Attorneys for Air Products
and Chemicals, Inc.

JOHN F. MCCLURE*
ARNSTEIN, GLUCK, WEITZENFELD
& MINOW
Sears Tower - 75th Floor
Chicago, Illinois 60606
(312) 876-7100
Attorneys for Chemetron
Corporation and Allegheny
International, Inc.

MILES KIRKPATRICK*
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 876-5000

WILLIAM G. SCHOPF, JR.
REUBEN & PROCTOR
Suite 2001
11 South LaSalle Street
Chicago, Illinois 60603
(312) 558-5545
Attorneys for Liquid
Air Corporation

JOHN E. BURKE*
ROBERT C. NEWMAN
ROSS, HARDIES, O'KEEFE,
BABCOCK & PARSONS
One IBM Plaza
Chicago, Illinois 60611
(312) 467-9300
Attorneys for Airco, Inc.

H. BLAIR WHITE*
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000
Attorneys for Union
Carbide Corporation

Attorneys for Respondents